Supreme Court, U.S
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

STEVEN GERACI, STEVEN COLLARA, AND CHALMETTE JEWELRY, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED FOR REVIEW

1. May courts examine the circumstances under which "facially valid" indictments were obtained, as in the second and ninth circuits, or are courts powerless to do so, as in the fifth and tenth circuits?

2. Can an indictment obtained by switching from one grand jury to another while both were still in session be valid on its face within the meaning of *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988)?

3. Does switching from one grand jury to another while both are still in session require or permit dismissal of the indictment for any of three reasons:

(a) The refusal to allow the first grand jury to fulfill its only constitutional function caused a structural defect that implicated Petitioners' right not to be tried within the meaning of *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989).

(b) The government's interference with the first grand jury's independence and preemption of its only constitutional function completely disregarded the ABA Standards for Criminal Justice – particularly Standard § 3-3.6(f) (3d ed. 1993) – the appropriate and enforceable guide for determining the reasonableness of attorney conduct under *Strickland v. Washington*, 466 U.S. 668 (1984), among other cases.

(c) The government's conduct distorts the purpose of the grand jury by doing away with the historical protections afforded the accused contrary to pronouncements of the Court since *Ex Parte Bain*, 121 U.S. 1, 11 (1887).

LIST OF PARTIES AND AFFILIATED CORPORATIONS

All parties below are listed in the caption. The corporate Petitioner has no affiliates, subsidiaries, or parents.

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PETITION FOR WRIT OF CERTIORARI

All facts required for the disposition of the issue before the Court are contained in the opinion of district court reprinted in Appendix C. Simply put: a grand jury was empaneled in August of 1994 and commenced investigating Petitioners. The government presented evidence to this grand jury for over six months, but then simply switched the case to a second grand jury. These were not successive grand juries; they were concurrent, sitting at the same time. The second grand jury heard only summary hearsay testimony from a single witness, and handed up the indictment the government sought. The district court denied Petitioners' motion to dismiss the indictment. A panel of the court of appeals affirmed, and Petitioners filed this Petition.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Fifth Circuit was entered on August 18, 1997. It is reprinted in Appendix A to the Petition.

The judgments of the United States District Court for the Eastern District of Louisiana were entered on August 28, 1996. They are reprinted in Appendix B to the Petition.

The order of the United States District Court for the Eastern District of Louisiana denying Petitioners' Motion to Dismiss the Indictment was entered on March 21, 1996.

It is also unreported and reprinted in Appendix C to the Petition.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The text of the Grand Jury Clause of the Fifth Amendment to the United States Constitution reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury.

STATEMENT OF THE CASE

This case commenced when agents of the Custom Service and Bureau of Alcohol, Tobacco & Firearms began an investigation of Petitioners in February or May of 1993. Chalmette Jewelry, Inc. is a federally licensed firearms dealer. The individual Petitioners each own 25% of the company and are employed by it. The government conducted undercover operations designed to obtain evidence that Petitioners were making "straw sales" in violation of the Gun Control Act of 1968 and its administrative interpretation by the Bureau of Alcohol,

Tobacco & Firearms. A grand jury was empaneled in August of 1994 to determine if there was probable cause to indict Petitioners for violations of the firearms laws. There is no dispute that the government presented months of live testimony, but then simply switched to a second grand jury while the first grand jury remained in session; the second grand jury heard only hearsay testimony from one witness; when Petitioners were indicted, at least two members of the first grand jury attempted to report what they felt was government misconduct; they apparently did not believe that their grand jury would have handed up a true bill, and retained an attorney to advise them what to do; that attorney called counsel for Petitioners, who suggested the trial judge be informed; the identities of the grand jurors were furnished to the trial judge, the judge who impaneled the first grand jury, and the magistrate judge in charge of the proceedings, but no grand juror was ever interviewed. Petitioners' motion to dismiss the indictment or inspect grand jury materials was denied on the basis of an *in camera* review of documents selected by the government. The first trial resulted in a hung jury on January 22, 1996. Petitioners brought a second motion to dismiss the indictment on the grounds that the government's use of concurrent grand juries (a) resulted in a structural flaw that implicated Petitioners' right not to be tried, (b) preempted the function of the first grand jury and interfered with its independence in violation of ethical standards approved by the Court, (c) was in direct violation of Department of Justice policies that followed these ethical standards and were expressly designed to avoid even the appearance of

unfairness, and (d) ignored the court's repeated pronouncements that the historic function of the grand jury was to protect defendants from government abuse. The district court denied the motion on March 20, 1996, ruling that the constitutional claim was baseless because the government's conduct was no different than obtaining an indictment from a second, successive grand jury, as approved in *United States v. Thompson*, 251 U.S. 407 (1920). The district court also ruled that it was precluded by *Bank of Nova Scotia v. United States*, 487 U.S. 250, 261 (1988), from looking behind a facially valid indictment. The court stated without authority that the government's failure to follow its own guidelines could not rise to the level of constitutional error. The district court did not address the government's interference with the first grand jury's independence or preemption of its function in violation of recognized ethical standards, and did not indicate how or why it determined that the indictment in this case was valid on its face. A petition for writ of mandamus was denied by the court of appeals on January 5, 1996. A second trial began on April 1, 1996, and ended in guilty verdicts on April 8, 1996. Petitioners timely brought a motion for new trial based on, among other things, the government's use of concurrent grand juries and newly discovered evidence that false testimony had been given by the government's most credible witness, one it told the jury to pay particular attention to. The district court denied the motion from the bench after concluding that controlling law allowed it to grant a new trial only after

viewing the evidence in the light most favorable to the government. Petitioners filed a notice of appeal on September 4, 1996, specifically listing the order denying their motion to dismiss the indictment as well as the district court's judgment and its order denying Petitioners' motion for new trial. Oral argument was held before a panel of the court of appeals on August 5, 1997. On April 18, 1996, the panel affirmed the trial court in a *per curiam* opinion that simply stated the panel found "no reversible error" in the trial court's disposition of the case. This Petition followed.

REASONS WHY THE WRIT SHOULD BE GRANTED

The issue presented meets the requirements of Supreme Court Rule 10(a) & (c). It is particularly appropriate for determination by the Court. ***First***, whether the government ought to be allowed to avail itself of concurrent grand juries by switching from one to the other while both are in session is a matter of obvious importance. Although almost every felony prosecution is initiated by presentment to a grand jury, there has never been a reported decision on the permissibility of utilizing concurrent grand juries to obtain an indictment. ***Second***, the ruling by the district court that it was powerless to question a "facially valid indictment" misses the point. An indictment cannot be "facially valid" when the government concededly obtained it by switching from one sitting grand jury to another, thus preempting the grand jury's ability to determine probable cause – its only constitutional function – and interfering with its independence. Indeed, it is not an indictment and the grand jury

was not a grand jury. *See Midland Asphalt Co. v. United States*, 489 U.S. 794, 801-02 (1989). ***Third***, the court of appeals' affirmance of the district court's finding that it could not examine an indictment ostensibly valid on its face conflicts with the law in other circuits. *E.g., United States v. Hogan*, 712 F.2d 757, 759 (2nd Cir. 1983). ***Fourth***, the notion that prosecutors have no enforceable ethical obligation to observe the status of the grand jury as an independent entity is contradicted by the ABA Standards for Criminal Justice, repeatedly recognized by the Court as a "proper guide for determining what is reasonable under the circumstances." *E.g., United States v. Young*, 470 U.S. 1, 7 (1985); *Strickland v. Washington*, 466 U.S. 668, 690 (1984). ***Fifth***, there are no factual disputes, the issue has been carefully preserved, and the question is encapsulated in the opinion of the district court reprinted in Appendix C.

The Court ought to (a) decide this important issue of federal law, (b) resolve the confusion among several courts of appeals about whether indictments such as the one in this case can never be questioned because they are "facially valid", and (c) exercise its supervisory jurisdiction to identify the criteria required to determine whether an indictment is valid on its face and thus may not be challenged; indicate when the right not to be tried could be implicated if not here; and inform the government and the lower courts whether the historic protections afforded by the grand jury are real or the pronouncements of the Court are *dicta*, mere rhetoric lower courts are free to disregard.

I. THE COURT SHOULD RESOLVE THE CONFUSION AMONG THE CIRCUITS OVER WHEN AN INDICTMENT MAY BE QUESTIONED

In *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), the Court stated that

> courts may not inquire into the reliability or competence of the evidence underlying facially valid indictments.

487 U.S. at 261.

This is far from a new rule. *E.g., United States v. Calandra*, 414 U.S. 338, 345 (1974); *Costello v. United States*, 350 U.S. 359, 409 (1956). Nonetheless, it appears to have been misinterpreted by at least some courts of appeals. In some circuits, such as the fifth, a determination that the indictment is facially valid precludes further inquiry into the underlying circumstances. That is what happened here. The tenth circuit refuses to look further if the indictment informs the defendant of the elements of the offense charged so that he is aware of what he must defend against and what he may assert to avoid being placed in jeopardy twice for the same offense. *E.g., United States v. Meyers*, 95 F.3d 1475, 1485 (10th Cir. 1996). Other circuits, such as the ninth, frequently allow examination of all aspects of the way in which indictments were obtained. *See, e.g., United States v. Samango*, 607 F.2d 877 (9th Cir. 1979). Still others, such as the second, appear to be somewhere between these two extremes, rarely allowing inquiry, and then primarily when the independence of a grand jury is compromised. *See United States v. Hogan*, 712 F.2d 757 (2d Cir. 1983).

Petitioners believe that the ninth circuit at least arguably allows too much latitude and the fifth circuit prevents the raising of legitimate issues. The sounder view is that of the second circuit, requiring some showing of interference with the independence of the grand jury. Petitioners submit that *Costello, Calandra,* and *Bank of Nova Scotia* properly preclude defendants from questioning indictments solely on the basis of the competence, quality, and adequacy of the evidence presented when an indictment "returned by a legally constituted and unbiased grand jury [is] valid on its face. . . . " *Costello v. United States,* 350 U.S. at 409 (citation omitted). But whether a grand jury was unbiased or legally constituted (whatever that may mean) could never be determined if no inquiry could be made into any indictment that complied with Rule 7(c)(1). This would sanction grand juries made up of fewer than 16 members, or from which women and blacks had been excluded, or which did not vote until after the expiration of their terms, or which heard no evidence but indicted simply at the government's request. This cannot, of course, be so, but lower courts' reactions are inconsistent and *ad hoc*. They need to be told the criteria for determining the facial validity of indictments and legal constitution of grand juries, as well as the proper limitations on questioning evidence and surrounding circumstances. Where, as here, the government has admittedly preempted the ability of a grand jury to determine probable cause and interfered with its independence by switching to another grand jury without allowing a vote, the second grand jury cannot be said to be "legally constituted" and the indictment it hands up is simply not "valid on its face". This situation is unlikely to

arise with any great frequency because the secrecy imposed by Federal Rule of Criminal Procedure 6(e) prevents defendants from learning that the entire array of the grand jury has been altered – let alone making the kind of particularized showing courts require. But when, as in this case, such a showing has been made, challenges to the validity of the indictment and the grand jury should be allowed. To hold otherwise would fail to preserve the actual and apparent integrity of the judicial process.

II. AN INDICTMENT OBTAINED BY SWITCHING GRAND JURIES WHILE BOTH ARE IN SESSION IS INVALID

Insisting upon strict compliance with all constitutional and ethical standards is particularly important in the case of indictments for selling guns or anything else that inspires feelings of fear or repugnance. Such indictments are especially dangerous when much of the conduct charged consists of acts (*e.g.*, firearms sales to parents of minor children) that were unpopular rather than unlawful.

A. Petitioners Had A Right Not To Be Tried

As the trial court found, the government presented its case to a grand jury, but switched to another grand

jury before the first was allowed to deliberate or vote. The trial court then stated

> defendants, despite their outcry, do not explain why transferring the case *before* deliberation or vote rises to constitutional error, if representation and transfer after refusal does not.[1]

What constitutional error would there be if a grand jury heard no evidence, was told to indict on a scintilla of evidence, or had nine members? Why should a confession not be admitted simply because it was obtained in open violation of *Miranda*,[2] or evidence concededly belonging to a defendant be excluded just because it was illegally seized? There, as here, the answer is evident, and it has to do with the rule of law and the primacy of the Constitution.

Petitioners are complaining about a good deal more than an indictment based on hearsay or unpresented exculpatory evidence. Petitioners submit they should never have been put on trial. *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989), found the right not to be tried "rests upon an explicit statutory or constitutional guarantee that trial will not occur", such as that contained in the Grand Jury Clause:

> But that is far from saying that every violation of [traditional common-law] protections, like the lack of a grand jury indictment itself, gives rise to a right not to be tried. . . . *Only a defect so fundamental that it causes the grand jury*

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[1] Memorandum Order and Reasons in *United States v. Geraci*, No. 95-274 (E.D. La. Mar. 21, 1996), at A13.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

> *no longer to be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried.*

489 U.S. at 801-02 (emphasis added).

An indictment is no longer an indictment when it is returned, not by a grand jury empaneled to determine if there were probable cause, but one chosen by the Government for its subservience (or any other reason for that matter).

The defect here was undeniably fundamental and it implicated the explicit Constitutional guarantee not to be tried. The Constitution says nothing about the number of grand jurors or a length of a grand jury's term. But there is no question that an indictment obtained from a grand jury of eleven members or handed down after the expiration of the grand jury's term would be a structural defect that would cause the indictment to be invalid *ab initio*. A defendant has a right not to be charged or tried under such an indictment, as recognized in *United States v. Gale*, 109 U.S. 65 (1883). The structural flaw caused by the use of concurrent grand juries should be no different. The constitutional guarantee is, if anything, more explicit here, and the structural defect equally apparent. The constitutional injury here is distinguished primarily by the clarity and specificity of the language of the Grand Jury Clause.

Petitioners represent an unusual class of criminal defendants: they are not asking for the creation, implication, or recognition of some new constitutional right; they seek a literal reading of the language of the Constitution according to its historical context and the intent of the

framers. They contend it is implausible that the framers included the Grand Jury Clause in the Bill of Rights if its sole purpose was to be purely ministerial.

If the government can move matters to a second grand jury with impunity, why not a third, a fourth, and so on? Allowing the government's actions would reduce grand juries to little more than focus groups.

The question is clearly novel as well as significant, and a writ is warranted.

B. The Government Has Ignored Enforceable Ethical Restraints

The trial court ruled that Petitioners' "reliance on the internal policies of the United States Attorneys' office is equally misguided."[3] Even if disregard of internal requirements is a wrong without remedy, those policies essentially restate the ethical rules of the ABA Standards for Criminal Justice, particularly § 3-3.6(f). It is for the Court to decide precisely what ethical standards are expected of the government in criminal prosecutions:

> Federal courts adopt state or [American Bar Association] rules as their ethical standards, but whether and how these rules are to be applied are questions of federal law.

In re American Airlines, Inc., 972 F.2d 605, 610 (5th Cir. 1992), *cert. denied sub nom. Northwest Airlines, Inc. v. American Airlines, Inc.*, 507 U.S. 912 (1993).

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[3] Memorandum Order and Reasons in *United States v. Geraci*, No. 95-274 (E.D. La. Mar. 21, 1996), at A13.

The Court has consistently found the ABA Standards appropriate guides to determine whether conduct is reasonable. *United States v. Young*, 470 U.S. 1, 7 (1985); *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The relevant provision of the ABA Standards of Criminal Justice states:

> A prosecutor in presenting the case to a grand jury should not intentionally *interfere with the independence of the grand jury, preempt a function of the grand jury,* or abuse the processes of the grand jury.

ABA Standards for Criminal Justice § 3-3.6(f) (3d ed. 1993) (emphasis added).

Neither the lower courts nor the government has ever addressed Petitioners' argument that the government violated ethical standards of criminal practice repeatedly found to be enforceable in federal court. At a minimum, the prosecution's "grand jury shopping" to obtain an indictment has preempted a function of the grand jury and interfered with its independence in violation of § 3-3.6(f).

C. The Government Has Perverted The Purpose Of The Grand Jury

The Grand Jury Clause of the Fifth Amendment does not exist to aid the government. Rather, it

> is designed as means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation whether it comes from government, or be promoted by partisan passion or private enmity.

Ex Parte Bain, 121 U.S. 1, 11 (1887) *quoted in Stirone v. United States*, 361 U.S. 212, 217 n.3 (1960); *see United States v. Calandra*, 414 U.S. 338, 342-43 (1974).

The Constitutional significance of the "grand jury shopping" in which the government engaged is clear: a grand jury can hardly serve as an independent body assuring that defendants can be indicted only when the grand jury is convinced that there is probable cause to do so if the government can switch grand juries at its pleasure. *See, e.g., Stirone v. United States*, 361 U.S. 212 (1960):

> The very purpose of the requirement that a man be indicted by a Grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting *independently* of either prosecuting attorney or judge.

361 U.S. at 218 (emphasis added).

Petitioners are well aware that the traditional role of the grand jury has evolved over the years. But the grand jury surely retains some vestiges of its former function. The Court recognized this in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). *Bordenkircher* stands for the proposition that judicial oversight of prosecutorial conduct before grand juries is appropriate when the prosecutor is intending to inflict punishment for "what the law plainly allows." 434 U.S. at 364. The lower courts felt otherwise.

Petitioners submit the analyses of the court of appeals in *Hogan* was correct:

> [P]rosecutors . . . have gained such influence over grand juries that these bodies' historic independence has been eroded. . . . Nonetheless,

> there remain *certain limitations* on the presentation that a prosecutor may make to the grand jury. In fact the gain in prosecutor's influence over grand juries is all the more reason to insist that these limitations *be observed strictly*. . . . Under the applicable guidelines, prosecutors have an ethical obligation strictly to observe the status of the grand jury as an *independent* legal body.

712 F.2d at 759 (citations omitted; emphasis added) *citing* ABA Standards for Criminal Justice § 3-3.6(f).

The *Hogan* court found that prosecutors had so abused their power that it dismissed the indictment after conviction. 712 F.2d at 757.

If cases such as *Stirone* have any substance, the Indictment ought to be dismissed. If they represent no more than rhetorical flourishes the Court ought to exercise its supervisory jurisdiction and inform the lower courts and the government.

CONCLUSION

The government did what Petitioners charge, and the trial court so found.[4] Petitioners are not complaining of some species of misconduct or irregularity that prejudiced a grand jury against them; they contend they have a right to be indicted by an independent grand jury, not

[4] Memorandum Order and Reasons in *United States v. Geraci*, No. 95-274 (E.D. La. Mar. 21, 1996), at A13.

by a grand jury the government finds acceptably compliant or unconcerned. That is what the Grand Jury Clause is all about.

The strictures of Rule 6(e) and the requirement for particularity almost always prevent the government from being called to account. But the requisite showing of particularity has been made here. The issue is unlikely to be presented so squarely any time soon. Preempting the constitutional function of a grand jury injures the integrity of the government, the judiciary, and the rule of law.

The writ ought to be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-30928

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

STEVEN GERACI, STEVEN COLLARA, and CHALMETTE JEWELRY, INC.

Defendant-Appellants,

Appeal from the United States District Court For the Eastern District of Louisiana (95-CR-274)

Before JOLLY, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:[1]

Appellants Geraci, Collara, and Chalmette Jewelry, Inc. were found guilty by a jury under 18 U.S.C. § 371 for conspiring to violate the federal firearms law and under 18 U.S.C. § 922(d) for selling firearms and ammunition to a convicted felon. Appellants assign numerous points of error on appeal including *Brady*, search warrant, Grand

[1] Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Jury and Confrontation Clause issues, as well as prosecutorial misconduct, and insufficiency of evidence claims.

Having considered the briefs and oral arguments of counsel and the record, we conclude that the district court did not commit reversible error. The appellants' convictions are AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA CRIMINAL ACTION
VS.

STEVEN GERACI 437-74-5562 95-274 F
(SOC. SEC. NO.) (CASE NO./SEC.)

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date ---------- Month Day Year (August 28, 1996)

_ WITHOUT COUNSEL
X WITH COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.
EADES HOGUE, 601 POYDRAS ST., NOLA 70130
(Name of Counsel)

Court Reporter's Name: TUSA
PLEA: _ **GUILTY,** and the court being satisfied that there is a factual basis for the plea.

_ **NOLO CONTENDERE** X **NOT GUILTY**

(_ **NOT GUILTY.** Defendant is discharged.
There being a verdict of (X **GUILTY ON 4-8-96**

Defendant has been convicted as charged of the offense(s) of 18 USC 371 CONSPIRACY TO VIOLATE THE FEDERAL FIREARMS LAW (CT. 1) and 18 USC 922(d) SALE OF FIREARMS AND AMMUNITION TO A CONVICTED FELON (CTS 2-8) IN THE SECOND SUPERSEDING INDICTMENT.

The sentence is imposed pursuant to the Sentencing Reform Act of 1984. The court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 33 months, as to Counts 1 through 8, to be served concurrently. The defendant is fined the sum of 10,000.00 as to counts 1 through 8. Said fine includes the cost of confinement. The payment of the fine shall begin while incarcerated and upon release, any unpaid balance shall be paid at the rate of $300.00 per month. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years as to Counts 1 through 8, with all counts to run concurrent. Within 72 hours of release from the custody of the Bureau of prisons, the defendant shall report in person to the probation office in the district to which the defendant is released. While on supervised release, the defendant shall comply with the standard general conditions that have been adopted by this court. The defendant shall not possess a firearm or be in the business dealing with firearms. In addition, the following special conditions are imposed. The defendant shall provide the probation officer with access to any requested financial information. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the

probation officer unless the defendant is in compliance with the installment payment schedule. The defendant shall pay any fine imposed. Remaining indictments are dismissed and the defendant shall remain on bond pending appeal.

IT IS FURTHER ORDERED that the defendant shall pay to the United States a special assessment of $50.00 as to Count(s) 1-8, for a total assessment of $400.00

IT IS FURTHER ORDERED that the defendant notify the United States Attorney for this District within 30 days of any change of residence or mailing address until all fines, restitution, costs and special assessments imposed by this Judgment are fully paid. In addition to the special conditions of probation imposed above, **IT IS HEREBY ORDERED** that the general conditions of probation/ supervised release set out on the reverse side be imposed.

IT IS FURTHER ORDERED:

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[ ] The court has determined that the defendant does not have the ability to pay interest. The interest requirement is (waived) (modified as follows):

SIGNED BY:
XX U.S. District Judge
___ U.S. Magistrate _____

CERTIFIED AS
A TRUE COPY
ON THIS DATE ___
BY: _____

(Date) 8/28/96

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

VS.

CRIMINAL ACTION

STEVEN COLLARA 436-76-8278 95-274 F
(SOC. SEC. NO.) (CASE NO./SEC.)

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date ---------- Month Day Year (August 28, 1996)

_ WITHOUT COUNSEL
X WITH COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.
EADES HOGUE, 601 POYDRAS ST., NOLA 70130
(Name of Counsel)

Court Reporter's Name: TUSA

PLEA: _ **GUILTY,** and the court being satisfied that there is a factual basis for the plea.

_ **NOLO CONTENDERE** X **NOT GUILTY**

(_ **NOT GUILTY.** Defendant is discharged.
There being a verdict of (X **GUILTY ON 4-8-96**

Defendant has been convicted as charged of the offense(s) of 18 USC 371 CONSPIRACY TO VIOLATE THE FEDERAL FIREARMS LAW (CT. 1) and 18 USC 922(d) SALE OF FIREARMS AND AMMUNITION TO A CONVICTED FELON (CTS 2-8) IN THE SECOND SUPERSEDING INDICTMENT.

The sentence is imposed pursuant to the Sentencing Reform Act of 1984. The court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 33 months, as to Counts 1 through 8, to be served concurrently. The defendant is fined the sum of 10,000.00 as to counts 1 through 8. Said fine includes the cost of confinement. The payment of the fine shall begin while incarcerated and upon release, any unpaid balance shall be paid at the rate of $300.00 per month. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years as to Counts 1 through 8, with all counts to run concurrent. Within 72 hours of release from the custody of the Bureau of prisons, the defendant shall report in person to the probation office in the district to which the defendant is released. While on supervised release, the defendant shall comply with the standard general conditions that have been adopted by this court. The defendant shall not possess a firearm or be in the business dealing with firearms. In addition, the following special conditions are imposed. The defendant shall provide the probation officer with access to any requested financial information. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the

probation officer unless the defendant is in compliance with the installment payment schedule. The defendant shall pay any fine imposed. Remaining indictments are dismissed and the defendant shall remain on bond pending appeal.

IT IS FURTHER ORDERED that the defendant shall pay to the United States a special assessment of $50.00 as to Count(s) 1-8, for a total assessment of $400.00

IT IS FURTHER ORDERED that the defendant notify the United States Attorney for this District within 30 days of any change of residence or mailing address until all fines, restitution, costs and special assessments imposed by this Judgment are fully paid. In addition to the special conditions of probation imposed above, **IT IS HEREBY ORDERED** that the general conditions of probation/ supervised release set out on the reverse side be imposed.

IT IS FURTHER ORDERED:

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[ ] The court has determined that the defendant does not have the ability to pay interest. The interest requirement is (waived) (modified as follows):

SIGNED BY:
XX U.S. District Judge
__ U.S. Magistrate _____

CERTIFIED AS
A TRUE COPY
ON THIS DATE ___
BY: _____

(Date) 8/28/96

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

VS.

CRIMINAL ACTION

CHALMETTE JEWELRY, INC.	72-0679993 (SOC. SEC. NO.)	95-274 F (CASE NO./SEC.)

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date ---------- Month Day Year (August 28, 1996)

_ WITHOUT COUNSEL
X WITH COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.
EADES HOGUE, 601 POYDRAS ST., NOLA 70130
(Name of Counsel)

Court Reporter's Name: TUSA
PLEA: _ **GUILTY,** and the court being satisfied that there is a factual basis for the plea.

_ **NOLO CONTENDERE** X **NOT GUILTY**

(_ **NOT GUILTY.** Defendant is discharged.
There being a verdict of (X **GUILTY ON 4-8-96**

Defendant has been convicted as charged of the offense(s) of 18 USC 371 CONSPIRACY TO VIOLATE THE FEDERAL FIREARMS LAW (CT. 1) and 18 USC 922(d) SALE OF FIREARMS AND AMMUNITION TO A CONVICTED FELON (CTS 2-8) IN THE SECOND SUPERSEDING INDICTMENT.

The sentence is imposed pursuant to the Sentencing Reform Act of 1984. The court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is placed on probation for a term of five years as to Counts 1 through 8, with all counts to run concurrent. The defendant is fined the sum of $350,000.00 as to Counts 1 minus any offsets arrived by law regarding the fines of Steven Geraci and Steven Collara. Said fine shall be paid within 180 days or as directed by the probation officer. While on probation, the defendant shall comply with the standard general conditions that have been adopted by the court. The defendant shall not engage in the sale of firearms. In addition, the following special conditions are imposed: The defendant shall provide the probation officer with access to any requested financial information. The Defendant shall pay any fine imposed. Remaining indictments are dismissed.

IT IS FURTHER ORDERED that the defendant shall pay to the United States a special assessment of $200.00 as to Count(s) 1-8, for a total assessment of $1,600.00

IT IS FURTHER ORDERED that the defendant notify the United States Attorney for this District within 30 days of any change of residence or mailing address until all fines, restitution, costs and special assessments imposed by this

Judgment are fully paid. In addition to the special conditions of probation imposed above, **IT IS HEREBY ORDERED** that the general conditions of probation/ supervised release set out on the reverse side be imposed.

IT IS FURTHER ORDERED:

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[ ] The court has determined that the defendant does not have the ability to pay interest. The interest requirement is (waived) (modified as follows):

SIGNED BY:
XX U.S. District Judge
__ U.S. Magistrate _____

CERTIFIED AS
A TRUE COPY
ON THIS DATE ___
BY: _____

(Date) 8/28/96

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

CRIMINAL ACTION

VERSUS

NO. 95-274

STEVEN GERACI, ET AL

ORDER AND REASONS

Before the Court is the defendants' motion to dismiss the indictment. For the reasons that follow, the motion is DENIED.

Background

The Second Superseding Indictment, obtained by the government on February 13, 1996, charges each defendant with one count of conspiring to violate various federal firearms laws, in violation of 18 U.S.C. 371. The government charges the defendants with making "straw sales," over a ten-year period, to convicted felons and others prohibited from owning guns. The indictment specifies thirty-five separate overt acts in furtherance of the conspiracy.

In addition, Steven Geraci and Chalmette Jewelry, Inc. are each charged with seven counts of knowingly selling firearms and ammunition to a convicted felon in August and September, 1994, in violation of 18 U.S.C. §§ 922(d) (1) and 924(a) (2). The government charges Steven Collara with aiding and abetting these sales under

18 U.S.C. § 2. All defendants now seek to have the indictment dismissed on grounds of grand jury abuse and prosecutorial misconduct.

Law And Application

The defendants first contend that the prosecutors' use of two grand juries in the investigation of this case violates the Fifth Amendment. Most of the facts underlying this charge are not disputed. The government began presenting evidence in its investigation to a grand jury. Before the grand jury deliberated or voted, however, the government transferred the investigation to a second grand jury. The second grand jury returned an indictment. Although the defendants contend that the transfer occurred because the government knew that they would not obtain an indictment from the first grand jury, the Court agrees with the Fifth Circuit, Magistrate Moore, and Judge Beer that there is no foundation for such a charge.

Further, the defendants have no legal basis for their constitutional claim. It is long-settled that the government may seek an indictment from another grand jury if the first refuses. *United States v. Thompson*, 251 U.S. 407 (1920). The defendants, despite their outcry, do not explain why transferring the case *before* deliberation or vote rises to constitutional error, if representation and transfer after refusal does not. Their reliance on the internal policies of the United States Attorney's office is equally misguided. Even if these policies were in force (a fact strongly disputed by the government) and were violated, the defendants have shown no constitutional error;

a failure to follow internal administrative practices simply does not approach this level. Neither have the defendants established, to any degree, how violation of internal administrative policies could have any effect on the grand jury's role or deliberative process.

The defendants next draw upon *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), citing several instances of prosecutorial misconduct that they claim substantially influenced the grand jury. Specifically, they charge that the government presented hearsay testimony and withheld exculpatory evidence, including instances in which Mr. Geraci refused illegal sales. These accusations are not legally cognizable: if an indictment is facially valid, the Court may not inquire into the reliability or competence of the underlying evidence. *Id.* at 261. Further, each one of the defendants' challenges has been specifically rejected by the Supreme Court. *See United States v. Williams*, 504 U.S. 36 (1992) (holding that the government's failure to present substantial exculpatory evidence to the grand jury does not provide grounds for dismissal); *United States v. Calandra*, 414 U.S. 338 (1974) (holding that unconstitutionally-obtained evidence may be presented to the grand jury); *Costello v. United States*, 350 U.S. 359 (1956) (holding that grand jury may base its indictment on hearsay).

Finally, Steve Collara claims that the government brought additional counts against him in the Second Superseding Indictment because he did not yield to a plea bargain. Although styled as an unlawful "vindictive prosecution," Mr. Collara fails to address any of the elements of such a challenge. Proof of bad faith motive is not satisfied by vague hyperbole that the prosecutors sought

to "further[ ] the anti-gun plank of the Democratic Party platform." *Memorandum in Support*, at 24. Neither has Mr. Collara made out a due process violation under *Blackledge v. Perry*, 417 U.S. 21 (1974). The government contends that the December trial revealed new facts concerning Mr. Collara's involvement in the sales and his relative culpability. Thus, the prosecutors assert, they could not have brought these charges prior to trial. *See United States v. Goodwin*, 457 U.S. 368, 380, 380 nn.11-12 (1982). The defendants may dispute the government's decision; but if probable cause exists for the additional counts, they must save their challenges for trial.

Accordingly, the defendants' motion to dismiss the indictment is DENIED.

New Orleans, Louisiana, March 20, 1996.

MARTIN L.C. FELDMAN
UNITED STATES
DISTRICT JUDGE